

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re: : Chapter 11  
W.R. GRACE & CO., et al., : Case No. 01-01139 (KG)  
Reorganized Debtors. :  
\_\_\_\_\_:

United States Bankruptcy Court  
824 North Market Street  
Wilmington, Delaware  
September 19, 2017  
11:01 a.m. - 12:17 p.m.

B E F O R E :  
HON KEVIN GROSS  
U.S. BANKRUPTCY JUDGE  
  
ECRO OPERATOR: UNKNOWN

1 HEARING re Motion For Entry of an Order Enforcing Plan and  
2 Confirmation Order Against Internal Revenue Service [Filed:  
3 4/12/17] (Docket No. 32854) .  
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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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P R O C E E D I N G S

CLERK: Please rise.

THE COURT: Good morning, everyone. You may be seated. Thank you. We're here, of course, in the W.R. Grace matter in a matter involving the Internal Revenue Service.

MR. O'NEILL: Yes, Your Honor. Good morning.

THE COURT: Good morning, Mr. Higgins -- not Mr. Higgins, I'm sorry -- Mr. O'Neill.

MR. O'NEILL: That's all right. You got that on the right side at least.

THE COURT: Yes.

MR. O'NEILL: That's good.

THE COURT: And I thank you all for understanding my problem yesterday with being here and allowing this to reschedule.

MR. O'NEILL: Your Honor, we don't view that as a problem.

THE COURT: All right.

MR. O'NEILL: And congratulations.

THE COURT: Thank you.

MR. O'NEILL: We're very happy to hear your news and glad everybody is happy and healthy.

THE COURT: Yes. Thank you, sir.

MR. O'NEILL: James O'Neill appearing on behalf of

1 the reorganized debtors from Pachulski Stang Ziehl & Jones.  
2 With me at counsel table is my co-counsel in this matter,  
3 Roger Higgins.

4 THE COURT: Yes.

5 MR. O'NEILL: And, Your Honor, the Court knows our  
6 client, Richard Finke, who is with us in the Courtroom  
7 today.

8 THE COURT: Mr. Finke, good morning.

9 MR. O'NEILL: General counsel of Grace. Your  
10 Honor, I'm going to turn the podium over to Mr. Higgins  
11 who's going to present our argument. Mr. Benson is here for  
12 the Department of Justice today.

13 THE COURT: All right. Is it not Mr. Benson who  
14 should go first, or does that not matter, Mr. Benson?

15 MR. BENSON: I'm happy to and, in fact, would like  
16 to. It is their motion.

17 MR. O'NEILL: It's our motion.

18 THE COURT: It's your motion, okay. All right.

19 MR. O'NEILL: So shall we?

20 THE COURT: Yes.

21 MR. O'NEILL: We'll start out?

22 THE COURT: Yes, you start out.

23 MR. O'NEILL: Okay, thank you.

24 THE COURT: I just wasn't sure burden of proof-  
25 wise who has the burden of proof on this claim issue. But I

1 guess it's really a legal argument at this point.

2 MR. O'NEILL: It is a legal argument, Your Honor.

3 THE COURT: Yeah. Yes, thank you. Mr. Higgins,  
4 good to see you again.

5 MR. HIGGINS: Well, thank you, Your Honor. Roger  
6 Higgins for the reorganized debtors. In fact, that -- you  
7 really sort of stole the first line, which really is, this  
8 is a legal argument.

9 THE COURT: Yes.

10 MR. HIGGINS: You know, unless counsel sees  
11 differently. I don't think there are any undisputed facts  
12 here, although I think it may take a couple of minutes to  
13 sort of get one's head around them. But when looked at,  
14 they're relatively simple and straightforward.

15 This all arises out of the tax year 1998, and a 10  
16 or 11 year, I think it was, examination by the IRS that did  
17 not conclude until of 2009. A claim that was first -- a  
18 claim that was first filed in 2002 for \$311 million by the  
19 IRS; subsequently amended to 11 million and some odd  
20 hundreds of thousands of dollars in 2012. The reorganized  
21 debtors came out of bankruptcy, went effective in February  
22 of 2014, and there were four IRS claims left among many  
23 others.

24 THE COURT: Yes.

25 MR. HIGGINS: Three of which were paid at 4.19

1 percent. They were allowed; there was no controversy over  
2 them. And the 11 million and change claim was objected to  
3 by the reorganized debtors in April of 2014.

4 At issue there was the tax amount, the -- and the  
5 allow -- what should be the allowed amount of the claim be.  
6 And one of the components of that proof of claim, that  
7 claim, was the post-petition interest, which the IRS had  
8 claimed at the statutory rate. In the -- ultimately, the  
9 claim was resolved between the IRS and the reorganized  
10 debtors, settlement -- settled in compromise. And the form  
11 of that settlement and compromise came through in the form  
12 of a withdrawal of the objection by the reorganized debtors  
13 and a withdrawal of the claim by the IRS.

14 Suffice it to say, there was no settlement  
15 agreement, quite frankly because the IRS didn't want to  
16 enter into a settlement agreement, and so we did this rather  
17 convoluted settlement and compromise. And that settlement  
18 and compromise gave the reorganized debtors the ability to  
19 allow claims or have them disallowed or compromise them  
20 pursuant to Section 5.1 of the plan without having the need  
21 for a final order.

22 So in April of 2014, and, indeed in September of  
23 2014 when the IRS finally sent its refund to Grace, the  
24 decision was taken by Grace to essentially call a stop to  
25 this claim, agree to the tax amount from 1998, which was

1 \$5.5 million, a little over 5.5 million -- \$5.8 million --  
2 excuse me -- and a certain amount of prepetition interest,  
3 which led to a total of about \$6.72 million as of the  
4 petition date.

5 THE COURT: Yes.

6 MR. HIGGINS: So there was clearly a claim  
7 existing at the time of the objection and of the -- and of  
8 this settlement and compromise.

9 What the IRS has argued -- and the issue today  
10 here is not what interest was paid after March 15th of '09  
11 when the claim was, the sort of the as-of date, the notional  
12 date on which the claim was satisfied, not the amount of  
13 interest that the IRS was paying on the refund amount post-  
14 3/15/09. But instead, the sole issue is what's the post-  
15 petition interest amount to be paid on that claim from April  
16 2nd of '01 to March 15th of '09. And what the IRS has  
17 argued is that there was recoupment.

18 THE COURT: Yes.

19 MR. HIGGINS: And that there was no claim for  
20 interest. And what the -- what Grace is arguing, the  
21 reorganized debtors are arguing, quite simply is, of course  
22 there was a claim.

23 We don't think that recoupment describes what  
24 happened here. We think that that theory is wrong on the  
25 merits. And what happened was that there was a claim for



1 \$6.7 million, plus interest from April 2nd of '01 through  
2 March 15th of '09, at which point because that was when the  
3 final one of the NOLs arose -- there was a number of NOLs --  
4 net operating losses. Excuse me, Your Honor.

5 THE COURT: Yes. No, I know, yes.

6 MR. HIGGINS: Net operating losses that arose in  
7 '01, '02, each year up through '07.

8 THE COURT: Yes.

9 MR. HIGGINS: And then you had the big one for  
10 '08, which arose as of March 15th of 2009, which is why that  
11 dates critical because that's the date the return was due  
12 and the date on which the NOL came into existence, and the  
13 tax credit that result from that, which the IRS agrees to.  
14 I don't think there's any disagreement on the amount of the  
15 tax credit or anything along those lines. It's just simply  
16 now what was the interest rate in --

17 THE COURT: Well, that's right. And they're  
18 arguing statutory interest applies.

19 MR. HIGGINS: And they're arguing statutory  
20 interest. And they're arguing that, well, the post-petition  
21 claim wasn't the claim because we recouped it. But, you  
22 know, our view is, well, there was a claim. Because in  
23 order for recoupment to happen, there has to be two  
24 antecedent claims. There has to be a claim by, in this  
25 case, the reorganized debtors for the tax credit that arose

1 as of the -- of March 15th of '09. And, quite frankly,  
2 because of the tax credits that arose in all of the other  
3 tax years because of the respective NOLs. So that's on one  
4 side.

5 And on the other side, you've got the IRS's claim,  
6 Claim 18553A I think was the ultimate name it was called.  
7 And that was for the tax that arose as of March 15th of 1999  
8 for tax year '98, the prepetition interest at the statutory  
9 rate from 3/15/99 through April 2nd of '01, plus the  
10 interest on this claim.

11 Now, there's a couple of reasons why recoupment  
12 really doesn't apply here. Number one --

13 THE COURT: Well, let me ask you this question --

14 MR. HIGGINS: Sure.

15 THE COURT: -- if I may. And I'll ask the same  
16 question of Mr. Benson from the IRS. But setoff, that's a  
17 claim. I think everyone agrees if there's setoff.

18 MR. HIGGINS: That's right, Your Honor. I agree  
19 with that.

20 THE COURT: And they say recoupment is not a  
21 claim. And in setoff, generally speaking, parties are  
22 dealing with multiple years; and in recoupment, they're  
23 dealing with one year. And isn't this a multiyear matter?  
24 I mean, we have NOLs from 2008; we have refunds for 2001 to  
25 2011; we have a deficiency claim for 1998. Aren't all of

1       these things --

2               MR. HIGGINS: We agree, Your Honor. That's -- I  
3       just hadn't gotten there yet. But the answer to that,  
4       simply put, is yes, absolutely. You've got NOLs from '01 to  
5       '08. You know, it's funny, I've got my two very well marked  
6       up copies of Exhibits C and D, which kind of lay this out if  
7       you, you know, fix your mind to it. And, you know, I was  
8       looking at it as much from the focus on -- you know, it's  
9       amazing the amount of agreement that's here and the  
10      agreement on what the claim was and to isolate this idea  
11      behind -- the idea of what's in controversy here, which is  
12      the interest rate. So that's, I think, one major reason why  
13      equitable recoupment doesn't apply.

14             The other is that equitable recoupment is an  
15      affirmative defense. And so affirmative defenses, I think,  
16      insofar as the IRS says that, you know, affirmative defenses  
17      aren't claims. But we're not talking about the affirmative  
18      defense; we're talking about what the claims were before you  
19      could apply the affirmative defense. And the affirmative  
20      defense never comes into play because the IRS and the  
21      reorganized debtors agreed on what the tax amounts should  
22      be.

23             Now, admittedly, because of the -- I don't wish to  
24      cast aspersions, but the way in which things happen -- very  
25      often happen with the government, the refund check appears

1 out of the middle of nowhere in September of 2014. And  
2 discussions were then taken, well, how do we wrap this claim  
3 up, and there were discussions that were ongoing about what  
4 the interest rate was. And so, you know, the decision was  
5 taken to focus on the claim, allow the claim in that amount,  
6 and work with the IRS on the appropriate interest rate, in  
7 which ultimately led to us appearing before you today.

8 THE COURT: Yes.

9 MR. HIGGINS: I think -- so I think those are the  
10 major points that I wanted to cover, Your Honor, is that,  
11 you know, there were claims, the interest was a claim, the  
12 plan is the sole source of interest in this -- for this  
13 claim. Remember, this is a priority claim, it's an  
14 unsecured claim. So thus, absent the plan when you look at  
15 Section 1015, the definition of claim of unmatured interest,  
16 and Section 502(b)(2) and its treatment, the generic  
17 treatment for unmatured interest claims -- they're, you  
18 know, disallowed. That you come back to, sort of, the one  
19 thing, as Curly said, is it's the interest rate here and the  
20 interest rate that's set forth in the plan.

21 THE COURT: Do you know what the IRS interest rate  
22 was?

23 MR. HIGGINS: Your Honor, I believe --

24 THE COURT: I'll ask Mr. Benson when he appears.

25 MR. HIGGINS: Yeah. I think as a general matter,

1 it was -- during that period, it was far higher than 4.19  
2 percent.

3 THE COURT: I assume that, yes.

4 MR. HIGGINS: And of course, you know, the  
5 financial crisis of '08. And then since then, the last 10  
6 years really or nine years, 4.19 percent has looked to be a  
7 very attractive rate.

8 THE COURT: Absolutely.

9 MR. HIGGINS: And, Your Honor, that's really --  
10 that's really it. This comes back to this is a claim,  
11 claims are treated under the plan, and recoupment, we never  
12 get to the issue of recoupment.

13 THE COURT: Okay. Thank you, Mr. Higgins. I  
14 appreciate that argument. Mr. Benson, good morning.

15 MR. BENSON: Good morning, Your Honor.

16 THE COURT: How are you?

17 MR. BENSON: Very well.

18 THE COURT: Good.

19 MR. BENSON: Your Honor, I'd like to first, if I  
20 may address an issue that sort of got glossed over that's in  
21 the briefing. There's much discussion of whether the  
22 interest was a claim.

23 THE COURT: Yes.

24 MR. BENSON: But in order for the plan provision  
25 that we're all talking about to apply, it's not just that we

1 have a claim, we must have an allowed claim. And I pointed  
2 out in my brief that because there was no final order, there  
3 was no allowed claim. There was an objection, we withdrew  
4 our claim -- our proof of claim -- debtor withdrew their  
5 objection.

6 THE COURT: Right.

7 MR. BENSON: And so as far as I'm concerned, there  
8 is no allowed claim. I would direct Your Honor to, in the  
9 definitions section, it appears in Definition 6(b). Mr.  
10 Higgins referenced an issue -- let's see -- whether  
11 something is resolved by the debtors and the claimant  
12 pursuant to Section 5.1 in the plan. I haven't read the  
13 plan since we initially -- or that section since we  
14 initially briefed it. But my recollection was that dealt  
15 with asbestos claims or some other type of claim that was  
16 not relevant to the present dispute.

17 So it was my reading of the plan and everything  
18 that -- all of the other sections it referred to, that we're  
19 just not dealing with an allowed claim. And so if Your  
20 Honor adopts that view, then all of these issues of is it a  
21 setoff, is this recoupment, what is this is all really  
22 irrelevant.

23 Moving on to the issue of setoff versus  
24 recoupment. First, I'd like to clarify another thing that I  
25 don't think was necessarily clear from the briefing. There

1 are really three doctrines at issue: there's what we refer  
2 to as setoff, what is traditionally referred to as setoff  
3 and that's the (indiscernible) case, which is pursuant to  
4 other common law setoff rights or Section 6402 of the  
5 Internal Revenue Code. When you have an overpayment from  
6 one year and an underpayment from another year, the IRS can  
7 net those.

8 THE COURT: Yes.

9 MR. BENSON: And that is what is always referred  
10 to as setoff. That's, you know, I'm in this Court and other  
11 Courts frequently dealing with issues of setoff. And,  
12 generally, how it comes up is you have prepetition -- the  
13 issue is are the underpayments and overpayments on the same  
14 side of the petition date or are they note, and then that  
15 gets into is 553 available.

16 There is what has been known as equitable  
17 recoupment, which is, as the debtors point out, is now  
18 embodied in a certain portion of the Internal Revenue Code  
19 in the 1300s, I believe. And that deals with same tax  
20 payer, usually different years, and it's the same  
21 transaction. And by transaction, you're actually talking  
22 about some kind of business transaction. And, you know, in  
23 one year -- recipient of funds in one year treats it as a  
24 gift and another year treats it as a loan being made.

25 And notwithstanding statute of limitations or any

1 other issues, the IRS can -- basically, a Court can say as a  
2 matter of consistency, we're going to -- you have to take a  
3 consistent position. And to the extent it's necessary to  
4 move money around, we'll do that. That is definitely not at  
5 issue here.

6 The third doctrine is sometimes known as  
7 recoupment. In the -- I'm not sure how to pronounce it --  
8 (indiscernible) case --

9 THE COURT: Yes.

10 MR. BENSON: -- that we cite, there is much  
11 discussion of offset, but it's dealing with that doctrine.  
12 And at a certain point, I think it I cite it in a footnote,  
13 it's on Page 283, this concept that I'm getting that, which  
14 is normally known as the defense of lack of overpayment from  
15 Lewis B. Reynolds is referred -- the case is referred to as  
16 the tap root of this branch of recoupment. So I think --  
17 and that's talking about what happened here.

18 And so I think part of the problem is Courts  
19 traditionally have not been entirely consistent in the use  
20 of the terms setoff, offset, and recoupment, largely because  
21 it doesn't matter in any way as much as it does in this  
22 Court because you don't have the issue of 553 versus not  
23 553. In those contexts, everybody understands what's going  
24 on.

25 So what we have here is the defense of lack of



1 overpayment. And it goes --

2 THE COURT: That's not in the brief anywhere, is  
3 it, that term?

4 MR. BENSON: It's in my brief.

5 THE COURT: It is? Okay.

6 MR. BENSON: I believe this -- on Page 5 of my  
7 brief in the footnote, I say: The Federal Circuit used the  
8 word offset in this decision, which I believe refers to  
9 (indiscernible) -- no, Pacific Gas & Electric -- and used  
10 the word offset in its decision and referred to the relevant  
11 doctrine as defense of lack of overpayment instead of  
12 recoupment. And then I note that other Courts have used  
13 that term, that recoupment, for defense of lack of  
14 overpayment. But I do reference that in the brief; perhaps,  
15 that should have been in the body, not a footnote.

16 But, yeah, so what we're dealing with here is the  
17 defense of lack of overpayment, which in a bankruptcy  
18 context is the equivalent of recoupment. Because it is a  
19 defense, we're not saying we have a claim. We're just  
20 saying you say we owe you money; we believe, based on  
21 everything that happened in that tax year, we don't owe you  
22 as much. And so there is no claim to bring because, in  
23 fact, we -- they owe -- or we owe them money and that's  
24 undisputed; they don't owe us anything.

25 THE COURT: How do you get anything from a

1 bankrupt without a claim being filed?

2 MR. BENSON: Well, we didn't get anything.

3 THE COURT: Because you --

4 MR. BENSON: Because we said --

5 THE COURT: -- you did the arithmetic basically.

6 MR. BENSON: Yeah. And this gets to a very  
7 important point, Your Honor. You said -- asked Mr. Higgins,  
8 doesn't this involve different tax years. And the answer is  
9 in a sense, yes; but in the crucial material sense, no.

10 This is not overpayment versus underpayment. This  
11 is not underpayment in '98, overpayment in 2008, because an  
12 overpayment is you paid too much tax.

13 THE COURT: Right.

14 MR. BENSON: If you have a taxpayer who pays no  
15 tax and incurs numerous net operating losses, which is often  
16 the case in debtors in this Court, there can't be an  
17 overpayment because they didn't pay anything.

18 What's going on is effectively NOL's tax  
19 attributes that arise in 2008 are carried back and factored  
20 into the liability in 1998. So it's functionally no  
21 different than if the NOLs arose in 1998, which based on  
22 what Your Honor was suggesting, that would unquestionably be  
23 the same tax year.

24 When you're dealing with carry forwards/carry  
25 backs, it's the same concept. We're only talking about the

1 liability between the parties for 1998. It's just they're  
2 able to kick tax attributes from one year and factor them  
3 into the liability for 1998. But it is definitely note the  
4 case that we're dealing with a Bankruptcy Code 553 or a IRC  
5 Code -- IRC 6402 situation, where it's we owe them money for  
6 one year, they owe us money for another year. I would  
7 actually assume that there was no overpayment in 2008  
8 because, generally, debtors in bankruptcy don't, except in  
9 the year of a 363 sale, generally don't have any taxable  
10 income.

11 I just want to address a couple more points. The  
12 debtors note that in the cases I cite, all of those involved  
13 unassessed interest. And that's not the case here; the  
14 interest was assessed. I don't think that's in any way  
15 material here because the reason all these cases deal with  
16 unassessed interest is that's the only way it comes up in  
17 refund litigation. If you have assessed interest or  
18 assessable interest, we would just suss it. There'd be no  
19 issue.

20 So the only way this gets litigated is you're  
21 dealing with situations where the IRS -- the statute of  
22 limitations to assess interest or whatever else has lapsed.  
23 The IRS engages -- asserts lack of overpayment based on  
24 whatever liabilities there are. The taxpayer jumps up and  
25 down and says you can't do that, statute of limitations.

1 And we say, no, it's recoupment, it's not offset, defense of  
2 lack of overpayment, and the Courts say that's fine. That's  
3 just because it would never come up in some other context.

4 But I don't think the distinction matters here.  
5 The point is we're dealing with interest that was owed  
6 initially, but then the NOLs were carried back. The NOLs  
7 are sufficient to generate a refund that exceeds the amount  
8 of the interest. And so, we have no right to payment, which  
9 would be necessary to have a claim. We unquestionably owed  
10 them money.

11 Finally, I think it was --

12 THE COURT: What was the interest rate, if you  
13 know?

14 MR. BENSON: It's would have -- it's based on, I  
15 forget if it's the Fed funds rate, or there's a baseline  
16 rate plus 3 percent.

17 THE COURT: Okay.

18 MR. BENSON: And so, that was much higher in 1998.  
19 Then it went to effectively zero in 2007-2007. It recently  
20 went up to 4. So I guess, you know, it fluctuated is the  
21 answer. I was not particularly focused on interest rates in  
22 1998 when I was, I think, still in junior high, so I can't  
23 exactly -- I can't opine on that.

24 THE COURT: All right.

25 MR. BENSON: Last of all, there was a mention in

1 the opening brief by the debtors that effectively, they  
2 could have paid and then sought a refund. And then when  
3 they paid us the initial amount sought, it would  
4 unquestionably be 4.19 percent because they were paying us a  
5 claim under the plan, and then gotten the refund and then  
6 that would allow them to pay 4.19 percent. And so Your  
7 Honor should let them basically undo what they did and do  
8 what they say they could have done, which would have been  
9 more profitable for them.

10 That couldn't have happened here, I don't think,  
11 because of the deadline, basically, statute of limitations  
12 to utilize the NOL carryback. And if I'm not mistaken, the  
13 NOLs here can only be carried back 10 years. And so that  
14 would be 10 years from whenever -- or 10 years from three  
15 years from the return being due, which I believe would have  
16 lapsed in presumably March 15th or September 15th of 2012,  
17 if I'm not mistaken on that. And so --

18 THE COURT: Doesn't bankruptcy stay that from  
19 running?

20 MR. BENSON: No, Your Honor. I don't see how it  
21 would. I don't have a provision to cite for you for why it  
22 wouldn't. But from my experience, debtors always -- my  
23 understanding was that that is not the case, especially  
24 because in a sense it's not a statute. It's just an  
25 administrative rule on when you can bring things. And then

1 is it 106 that deals tolling, but that's only for 60 days,  
2 if I remember correctly? Sorry, Your Honor, I didn't --

3 THE COURT: Okay.

4 MR. BENSON: I wasn't prepared for that question,  
5 so I don't know. But in my experience, no one has ever  
6 argued that. And since it would be frequently advantageous  
7 for people to argue that, I'm assuming it's -- nobody has  
8 come up with an argument that would support that position.

9 So effectively, it couldn't have happened. They  
10 could not have done this maneuver where they would pay our  
11 claim that 4.19 percent and then get a refund because of how  
12 long it took to have the plan confirmed and go effective.  
13 And so, hypothetically, yes, that would have been a better  
14 thing for them to do; but, based on the actual facts of this  
15 case, that was not possible.

16 So effectively debtors made the decision, we're  
17 going to file our refund request before the plan goes  
18 effective. You know, for all anyone knew, the plan was  
19 never going to be confirmed or go effective.

20 And so, from our view, they did what they seemed  
21 the best at the time. And it really seems odd and sort of  
22 inequitable for them to say, based on the plan being  
23 confirmed after we did this, retroactively, the interest  
24 rate is reduced, because that is effectively the argument, I  
25 believe. It couldn't have been 4.19 percent at the time the

1 refund was requested because the plan hadn't gone effective.  
2 They're basically saying, based on subsequent events, the  
3 plan going effective, please undo the statutory interest  
4 rate and now apply the rate under the plan.

5 So I think that's all the points I came to discuss  
6 if Your Honor has any questions for me.

7 THE COURT: I'm still kind of -- Mr. Benson, I'm  
8 still a little bit wrapped up with the fact that we're  
9 dealing with so many different years here. In other words,  
10 when you -- the calculations in the briefs involve the NOLs,  
11 to which you add the refunds from 2001 to 2011. And you  
12 subtract the 1998 tax deficiency, and you subtract interest,  
13 and then you add over -- add in overpayment interest. So  
14 you're dealing with different years in this sort of model  
15 that the IRS is using. That's what throws me off a little  
16 bit.

17 MR. BENSON: Okay. And the key distinction --

18 THE COURT: Yes.

19 MR. BENSON: -- between 6402/553 offsets and what  
20 I've called recoupment, what the Courts have also called  
21 defense of lack of overpayment, is that it's crucially if --  
22 the crucial distinction is you're not dealing with  
23 affirmative claims on both sides. It's not that they owed  
24 us for '98 and we owed them anything for 2008. It's their  
25 tax attributes that they are moving around, but there is no

1 overpayment on their end for any of these other tax years.  
2 And so, this is what corporate taxpayers are allowed to do;  
3 they're allowed to move things around. Individual taxpayers  
4 can do that to a more limited extent.

5 And if Your Honor takes a look at all the cases I  
6 cited, you know, I won't go into all of them, but you're  
7 generally dealing with attributes from different years.

8 THE COURT: Okay.

9 MR. BENSON: And that's always -- often the  
10 context where we are allowed -- you can litigate -- we, the  
11 IRS, can litigate issues that normally would be barred by  
12 statute of limitations regarding, you know, when is -- when  
13 did the tax attributes arise. We can litigate those issues,  
14 even if administratively or statutorily we couldn't  
15 independently, because we're not effectively dealing with  
16 those years. We're dealing with the year at issue for which  
17 a refund is sought. And those tax attributes are being  
18 brought into that year and are treated as now those years'  
19 tax attributes, and they're trying to use those tax  
20 attributes to lower the taxable income as they would if, you  
21 know, as anyone would do.

22 You know, if Your Honor makes charitable donations  
23 in a year, you take those against your income for that year.  
24 It's no different than -- well, I guess the better example  
25 would be if Your Honor sells some stock this year, doesn't



1 have enough taxable income to use, and you carry them  
2 forward up to 2000, I think.

3 But the point is, you can your capital losses for  
4 this year, bring them to the next year. They are treated  
5 for tax purposes exactly as if they arose in that year.  
6 They are, effectively, now for that year. And were we to  
7 challenge those things, that would be a recoupment issue  
8 because it's not that -- what would it be -- that you have a  
9 -- it's not an issue of overpayment versus underpayment.  
10 It's just an issue of, you've moved things around from  
11 different years and we're now litigating the year at issue.

12 THE COURT: But here's the thing. The refunds  
13 from 2001 to 2011, those are not a tax attribute, are they?

14 MR. BENSON: I'm sorry, Your Honor.

15 THE COURT: The refunds owed W.R. Grant for the  
16 years 2001 to 2011, which is part of this calculation, those  
17 are not tax attributes. I understand what you're saying  
18 about the NOLs, that the NOLs are tax attributes.

19 MR. BENSON: Yeah. I don't think that's at issue,  
20 is it? I thought the issue was '98 interest, and there was  
21 no issue about refunds. It was just about carrybacks.

22 THE COURT: Well, I have it in the formula that  
23 was being used that the parties added back the refunds from  
24 2001 to 2011, and that's part of how you arrive at the  
25 ultimate number that's owed.

1 MR. BENSON: Is that right?

2 THE COURT: Or that you owe -- or that you owe, I  
3 guess.

4 MR. BENSON: Yeah.

5 MR. HIGGINS: Your Honor, I'm sorry. I'm just  
6 looking at Exhibit C, which is, you know, for us bankruptcy  
7 lawyers, it's a (indiscernible). I mean, there were a  
8 series of generated overpayments applied in '01, '02, up  
9 through '09.

10 THE COURT: Yes.

11 MR. HIGGINS: Which is when this ends. I mean, so  
12 they came from whatever that is, eight tax years if I've got  
13 it right.

14 THE COURT: Yes.

15 MR. HIGGINS: Now, your question comes back, and I  
16 -- it is, you know, what are those. And I think that that's  
17 really the fundamental part, you know, what's fundamentally  
18 at issue here. And I don't want to take away from counsel  
19 as counsel's still talking here, but I think that, you know,  
20 that that's the -- that comes down to that's the issue.

21 MR. BENSON: Your Honor, I thought the only issue  
22 was NOLs from '98. I know there were some refunds for other  
23 years. I thought they were relatively immaterial given the  
24 amount of money. Even if that --

25 THE COURT: I think the NOLs are for 1998.

1 MR. BENSON: The 2000 into '98, the massive NOLs.

2 MR. HIGGINS: It was, so there was approximately  
3 \$885,000 give or take of tax credits generated '01 through  
4 '08 for a variety of reasons. I would have to go back and  
5 supply you with the detail that Grace's tax lawyers have  
6 informed me of. The '08, which is, you know, that's the --

7 THE COURT: Hold on one second, Mr. Higgins. Is  
8 it all right? Could it be that microphone? Let's try it  
9 again.

10 MR. HIGGINS: How about I come over here, Your  
11 Honor?

12 THE COURT: All right, okay.

13 MR. HIGGINS: So just operating from memory her,  
14 Your Honor. So we had 2001 to 2007, there were  
15 approximately -- and this is not in the briefing, this is  
16 what I subsequently gleaned as we were preparing for today -  
17 - is that '01 to '07 timeframe, there were a series of  
18 overpayments generated by a number of different tax  
19 attributes coming out of the those years. Whether they were  
20 NOLs or whatever they were, they generated tax credits of  
21 approximately \$885,000.

22 The tax credit from 2008 was, of course, many,  
23 many times that size -- \$9 or \$10 million. I don't have the  
24 number right in front of me. And so, you know, what comes  
25 to the point here is that the IRS has taken the position

1 that this should be dealt with as if bankruptcy never  
2 happened, and as if the plan were never confirmed in the  
3 first place, and as if the Bankruptcy Code doesn't have  
4 specific treatments or unmatured post-petition interest and  
5 the payment of that.

6 So, anyway, so that's my --

7 THE COURT: You'll have a chance.

8 MR. HIGGINS: And I apologize, Your Honor.

9 MR. BENSON: Your Honor, so I only have the record  
10 from '98, which doesn't allow me to -- two things could have  
11 happened. Administratively, an offset, a true offset, under  
12 6402 could have happened where, let's say, there's an  
13 overpayment in 2001 that then gets brought back and netted  
14 against the underpayment for '98. That's possible that  
15 could go into the calculation.

16 I vaguely recall, but I would need to check this,  
17 that some of the refunds were issued sort of out of those  
18 tax years, if that makes sense. The way the IRS does it is  
19 that you have a running account for every single tax year.

20 THE COURT: Yes, yes.

21 MR. BENSON: And, you know, I see here from the  
22 transcript, you have what they refer to as credits  
23 transferred in from various tax years. I don't know if --

24 THE COURT: Are you looking at Exhibit C?

25 MR. BENSON: No, no, no. I'm looking at something

1 I have myself, which I don't think I can admit. It's not  
2 properly redacted. Well, moving forward, I think given the  
3 confusion, this may necessitate further briefing. I think  
4 maybe both would be able to agree on that. And just looking  
5 at it, you know, with these complex corporate debtors,  
6 taxpayers, things go in and out all the time. So, you know,  
7 I'm looking at a 1.1 million credit that comes in and then  
8 goes out. I think this is something that would need to be  
9 determined.

10 If the refunds are being basically spit out of the  
11 tax years as they go along, then that's of no relevance.

12 THE COURT: Right.

13 MR. BENSON: So if, you know, it's the -- you  
14 know, again, Your Honor, you can do carrybacks from one --  
15 or carry forwards from one year to another. If you have  
16 another refund from a third year, if that's not being fixed  
17 in the calculation, then that's just another tax year refund  
18 going out. And I don't know if the check that went out was  
19 just combining everything, or if, in fact, there are  
20 multiple checks that went out on the same day that are being  
21 included in that number.

22 But to the extent you're dealing with what the  
23 first scenario of -- I guess the second scenario that I  
24 described as the true setoff of overpayment for 2007, it  
25 goes back into the calculation for '98 and gigantic NOL

1 from, I think, it's 2008.

2 THE COURT: Yes.

3 MR. BENSON: Which looking here, I think I'm  
4 looking at is 11.5 million. There was an \$11.5 million  
5 reduction in tax, which is probably just tens of millions of  
6 NOLs. That would be recoupment, and that dwarfs the other  
7 credits that are coming in. So this is going to be painful  
8 for, I guess, myself and Mr. Higgins to have to calculate  
9 this.

10 But I think to the extent there was a 6402 offset  
11 and that is a claim, which we dispute because there's still  
12 no allowed claim which is what matters. But to the extent  
13 there was an allowed claim that got carried back, one would  
14 need to effectively net the interest -- or one would need to  
15 calculate the interest based on the refunds that come back.  
16 And that could conceivably be 4.19 percent, and then the  
17 interest on the NOL portion would be the statutory rate.

18 I'm sure Mr. Higgins and I are both equally not  
19 looking forward to having to make that calculation if that's  
20 the case. Though, again, that's two contingencies: that's  
21 the refund overpayment credits were actually factored into  
22 '98, as opposed to just going out as things went along; and  
23 two, that we're dealing with a claim and particularly an  
24 allowed claim. And, again, Your Honor, I'd say if you, you  
25 know, look at the definition of allowed.

1 THE COURT: Yes, and you're saying it wasn't an  
2 allowed claim.

3 MR. BENSON: Right. It was, let's see, you know,  
4 it's allowed if there's no objection within the --

5 THE COURT: And there was no objection here.

6 MR. BENSON: And there was an objection, but then  
7 there's no objection, so that doesn't apply because there  
8 was an objection. As to which an objection to allowance was  
9 unopposed within the time provided and such objection has  
10 been overruled, which doesn't apply here. Resolved by  
11 agreement and the claimant, which is approved by final order  
12 of the Bankruptcy Court; there was no final order of the  
13 Bankruptcy Court. Resolved by agreement of the reorganized  
14 debtor and the claimant pursuant to 5.1; I don't have the  
15 full plan in front of me, but I believe when I reviewed it  
16 that did not apply.

17 I think it applies to certain kinds of asbestos  
18 claims. Determined by final order in the Chapter 11 cases;  
19 not applicable. And then as to which such claim is listed  
20 as an undisputed claim in Exhibit -- or listed on the  
21 undisputed claims exhibit, which has been filed pursuant to  
22 5.1, which was not our case.

23 So whatever Your Honor thinks ultimately would  
24 decide on these rather nuanced tax issues, I think it's just  
25 -- it's not an allowed claim. And if it's not an allowed

1 claim, the interest rate in that provision does not apply,  
2 and so we don't need to get to what could be a very painful  
3 series of calculations on interest.

4 THE COURT: All right. All right. Thank you, Mr.  
5 Benson. Mr. Higgins.

6 MR. HIGGINS: Your Honor, so to go back to Section  
7 5.1 of the plan.

8 THE COURT: Yes.

9 MR. HIGGINS: I think this is -- we got to start  
10 here, to be blunt. It says, and this at the top of Page 68:  
11 After the effective date, all objections that are filed and  
12 prosecuted by the reorganized debtors as provided herein may  
13 be (I) compromised and settled in accordance with the  
14 business judgment of the reorganized debtors without  
15 approval of the Bankruptcy Court. And that's what happened  
16 here.

17 THE COURT: Okay.

18 MR. HIGGINS: The reorganized debtors filed an  
19 objection in April of 2014. The IRS responded. There was a  
20 refund issued. And this is the point I was driving at  
21 earlier when I said that the IRS did not want to enter into  
22 a settlement agreement. The form of the settlement  
23 agreement was the withdrawal of the objection and the  
24 withdrawal of the claim. To be quite frank, Your Honor, if  
25 the reorganized debtors hadn't compromised and settled that



1 claim, there is no way on God's green earth that they would  
2 have withdrawn that objection. And so, that's the  
3 compromise and settlement.

4 There is no question that the two parties agree on  
5 the amount of the tax for 1998. There is no question that  
6 there is agreement on the amount of prepetition interest  
7 under Section 6402, I think, or whatever it is -- the  
8 section for dealing with prepetition, your normal statutory  
9 interest from the accrual date through the petition date.  
10 There is absolutely no controversy over that. That's what  
11 was compromised and settled. What is at issue here is the  
12 amount of interest that is calculate post-petition on that  
13 claim that was an allowed claim.

14 Now, to short circuit the government's arguments,  
15 I'm not sure that we I don't think we need to do any further  
16 briefing. In the government's opposition, it says the facts  
17 are not in dispute as stated in the response -- I'm sorry,  
18 yeah -- as stated in the response. The IRS granted a credit  
19 -- this is a tax credit -- of \$11,491,000 so on and forth,  
20 attributable to the carryback of NOLs.

21 And as Your Honor has already observed, there were  
22 approximately \$885,000 of other tax credits that were  
23 generated by other tax years. The tax credits are merely  
24 the currency with which this allowed claim were paid.  
25 Otherwise, Section 502(b)(2) and its disallowance of

1 unmatured interest would have no moment here. You know, I  
2 think that were we not in bankruptcy, we wouldn't have a  
3 quarrel with what counsel was saying, but we are in  
4 bankruptcy.

5 We are operating within the confines of a  
6 confirmed plan of reorganization that was confirmed in  
7 January of 2011. So in -- between 2011 and 2014, believe it  
8 or not, that was the length of time that that plan was --  
9 the confirmation order was under appeal, and those appeals  
10 only terminated in late 2013, give or take, that led  
11 ultimately to Grace exiting in February of '14. So, you  
12 know, it really doesn't matter from within that construct  
13 now.

14 Counsel made the argument that there was two  
15 different kinds of setoff, and it's governed by Section --  
16 for our purposes in bankruptcy by one section, Section 553.  
17 I think we all agree that doesn't apply because we got  
18 prepetition and we got post-petition, so that's off the  
19 table. Then you got equitable recoupment, which, quite  
20 frankly, we think is what the IRS is arguing.

21 And then they've got defense of lack of  
22 overpayment. You know, this is a line of cases that go back  
23 to Lewis D. Reynolds back in the 1920s and '30s, as I  
24 recall. And, you know, it's still -- it's, for our purposes  
25 here today, is a difference without a distinction in terms

1 of equitable recoupment because it's still an affirmative  
2 defense. It's an affirmative defense to a claim that was  
3 there, and so the -- that was existing as of the petition  
4 date.

5 And if those tax credits were generated in the  
6 post-petition years paid that claim as of March 15th of '09.  
7 Now, could Grace have written a check in March 15th of '09?  
8 Well, the answer is actually yes. Because, although Judge  
9 Fitzgerald was presiding at that point, there was a massive  
10 EPA settlement where Grace wrote a check for a quarter of a  
11 billion dollars right then and there.

12 And Grace could have done that, but, you know,  
13 that wasn't the time to do it because the parts -- you know,  
14 the parts hadn't stopped moving on the 10 years of the IRS  
15 looking at the 1998. Then, of course, that goes to the  
16 joint committee on taxation, a process that takes years and  
17 years and years. That was an evolution that didn't end  
18 until 2014, late 2014, when the IRS ultimately issued its  
19 refund. That claim was allowed and that claim was paid.  
20 And that claim was paid with tax credits.

21 That's really -- that's what I have. Thank you,  
22 Your Honor.

23 THE COURT: All right. Thank you.

24 MR. BENSON: Your Honor, if I could just take a  
25 look at taking the platform here.

1 THE COURT: Of course.

2 MR. BENSON: Your Honor, just --

3 THE COURT: Yes.

4 MR. BENSON: -- attempting to speed read this.

5 THE COURT: Take your time. Would you would a 5  
6 or 10-minute break, Mr. Benson? I certainly give that to  
7 you.

8 MR. BENSON: Sure.

9 THE COURT: And you can read it quietly and a  
10 little more leisurely.

11 MR. BENSON: I think the immediate issue here,  
12 Your Honor, is the provision section Mr. Higgins cited is  
13 after the effected date, all objections that are filed may  
14 be compromised. And I believe this was compromised before  
15 the effective date.

16 MR. HIGGINS: No. Your Honor, just to recite, if  
17 I could, recite the dates. Effective date, February 3,  
18 2014; claims fee, three other IRS claims that I mentioned at  
19 the beginning --

20 THE COURT: Yes.

21 MR. HIGGINS: They were paid approximately April  
22 18th. The checks were cashed approximately April 23rd.

23 THE COURT: And those were paid on claims that  
24 were actually filed.

25 MR. HIGGINS: Those were paid on claims at 4.19

1 percent.

2 THE COURT: Yes.

3 MR. HIGGINS: So there's no argument the 4.19  
4 percent was being paid on priority tax claims. The  
5 objection was filed on April 22nd of 2014, so approximately  
6 seven, eight weeks after the -- well, 10 weeks I guess it  
7 was -- after the effective date.

8 THE COURT: Okay.

9 MR. BENSON: Your Honor, if I could have five  
10 minutes to just take a look at this.

11 THE COURT: You certain -- yes, you may.

12 MR. BENSON: Okay.

13 THE COURT: Let's take a little recess and take  
14 your time reading it. I'll give you 10 minutes.

15 MR. BENSON: All right. Thank you, Your Honor.

16 THE COURT: All right? Yes, thank you.

17 [RECESS]

18 CLERK: Please rise.

19 THE COURT: Thank you. You may be seated. All  
20 right. Did you have anything to add, Mr. Benson, to the  
21 situation?

22 MR. BENSON: Two things, Your Honor. First, I  
23 mean, if you read it, the reflection of all judgments that  
24 are filed and prosecuted by the reorganized debtors may be  
25 compromised and settled. I think there's a question of

1 whether this was really prosecuted. Unfortunately, this is  
2 before -- well, slightly after I got to the DOJ that all  
3 this happened. So I can't, you know, testify to whether  
4 there was really a compromise versus, you know, or to agree  
5 to which we just withdrew.

6 More importantly, though, Your Honor, and I think  
7 this will probably require additional briefing.

8 THE COURT: Well, I don't think that you would --  
9 the IRS would have withdrawn a claim if there hadn't been a  
10 compromise of that claim.

11 MR. BENSON: It does happen, Your Honor.  
12 Depending on how, if there's no dispute that we're not owed  
13 money, we often will just withdraw. You know, it's not  
14 in our nature to continue to fight just to try to get some  
15 kind of settlement. So it -- I think it's a -- it happens  
16 all the time. That if someone, if there's an objection  
17 filed (indiscernible), we don't know this. It happens all  
18 the time that the IRS say do you actually agree with that  
19 and we'll say, you know, yes, and then the claim gets  
20 withdrawn.

21 So I don't know if that's considered a settlement.  
22 I don't really think that. If we're just told a claim  
23 should not have been filed, we withdraw. It's really only  
24 when there is a dispute about the amount of money, and we  
25 make a concession on the amount of money where we don't

1 necessarily agree that that's the amount, but we, for reason  
2 of litigation hazards if there's concern, that would be a  
3 settlement. There would be an exchange of documents,  
4 exchange of letters, formal settlement agreement. But,  
5 again, if it's just we have all of these NOSs which we've  
6 already carried back to withdraw your claim, we just do.

7 As to the more substantive issue, Your Honor, and  
8 this will require, in order for me to say confidentially I  
9 think Mr. Higgins to confidently disagree if he wants to. I  
10 think -- I'm just trying to work very rapidly on the  
11 calculator on my phone, but I think it's quite likely that  
12 most, if not all, of the abatement of tax that led to the  
13 refund was the result of the NOLs. And essentially, this --  
14 because I'm trying to look at this very long transcript --  
15 the handling of the abatement based upon the NOLs was  
16 roughly equivalent to the original tax recorded by the  
17 debtor.

18 With the views that what quite likely could have  
19 happened, it happened, is there's this \$12 million liability  
20 on the books adjusted for some certain things. The debtor  
21 carries back this huge amount of NOLs sufficient to wipe out  
22 that entire liability. The actual overpayments from other  
23 years come back in, and then the refund goes out based on  
24 the overpayments.

25 So in terms of the interest, the refund -- the

1 overpayment refunds are really irrelevant. It's totally a  
2 separate thing. I mean, when you're dealing with these huge  
3 taxpayers with very complicated taxes, you get 10-year  
4 examinations because every year everything changes, and so  
5 you have things moving around by modules. And just looking  
6 here that did happen that credits came in, credits left. So  
7 I want to do the math with more time and a better  
8 calculator.

9 But I think it's quite possible that we have  
10 recoupment as to the original liability, and then the refund  
11 that went out was mostly attributable to those overpayments  
12 from other years. And so, when this gets calculated, the --  
13 there's the issue -- so NOLs come back, that tax goes away,  
14 the underpayment interest gets calculated. That gets netted  
15 against the credits that have been brought in based on  
16 overpayments, and then what goes out is the difference.

17 So we come down to the very same -- the initial  
18 issue is who's right about 4.19 versus statutory rate. The  
19 credits just add on top of that, if that makes sense.

20 THE COURT: Okay.

21 MR. BENSON: Again, though, I'd want to be able to  
22 make the calculation a little more calmly, and I think that  
23 can be resolved with some pretty quick supplemental  
24 briefing.

25 THE COURT: Mr. Higgins, your position on that?



1 MR. HIGGINS: Well, Your Honor, I don't think we  
2 need any supplemental briefing on this. I'm going to point  
3 to the government's opposition on Page 6, the first full  
4 paragraph. It says: In this case, the IRS exercised its  
5 right of recoupment, not its right of setoff. And we've  
6 already talked about why recoupment doesn't apply here.

7 Note two, which is, it says: The IRS only  
8 determined the true amount that Grace's overpayment for that  
9 year, so on and so forth. And note two at the bottom of  
10 that page explains what the IRS did, or at least my  
11 understanding of what the IRS did. And I'm assuming that  
12 this is correct, is that: Specifically, the IRS granted a  
13 credit of \$11,491,000 some odd dollars.

14 So this goes back to my original point, Your  
15 Honor. This was an allowed claim. Remember, there was an  
16 objection. There was a claim filed for \$311 million; that  
17 was amended by an \$11.9 million claim, okay. Comprised  
18 three elements -- tax for '98, prepetition interest, and  
19 post-petition interest at the statutory rate. Okay. Grace  
20 objected to the amount of that claim.

21 THE COURT: Yes.

22 MR. HIGGINS: Okay?

23 THE COURT: No question.

24 MR. HIGGINS: That's all that Grace did. We  
25 objected to the amount of that claim because we said that

1 wasn't right. The IRS responded. And then there was an  
2 agreement in that Grace then withdrew its objection.

3 THE COURT: Right.

4 MR. HIGGINS: And then a month later, the IRS  
5 withdrew its claim. And I will tell you, as I was the  
6 counsel, that was a very unusual feeling to withdraw an  
7 objection and wait around for the claim to be withdrawn.

8 THE COURT: I would agree.

9 MR. HIGGINS: And that, Your Honor --

10 THE COURT: Without a written agreement, is that  
11 right?

12 MR. HIGGINS: Yes, Your Honor. For better or for  
13 worse, without a written agreement.

14 THE COURT: Right.

15 MR. HIGGINS: And, you know, because the IRS  
16 didn't want to enter into a written agreement. That's the  
17 settlement and compromise. Otherwise, would have litigated  
18 it, you know, and we'd have gone to town on it. But it  
19 wasn't necessary because the parties agreed on what the tax  
20 was and what the prepetition interest was.

21 THE COURT: But that brings into play Section --

22 MR. HIGGINS: 5.1 of the plan.

23 THE COURT: -- 5.1 of the plan.

24 MR. HIGGINS: Top of Page 68, settlement, you  
25 know, compromise and settled, Your Honor. And that's why

1 we've got an allowed claim, and that's why the 4.19 percent  
2 interest -- that's the only thing we're talking about here  
3 is what's the rate of interest from April 2nd of '01 to  
4 March 15th of '09. It's 4.19 percent, and I don't think we  
5 need any further briefing for Your Honor to arrive at a  
6 decision on that point.

7 THE COURT: All right.

8 MR. HIGGINS: Thank you. Mr. Benson, yes, sir.

9 MR. BENSON: Looking at the footnote that Mr.  
10 Higgins just referenced.

11 THE COURT: Yes.

12 MR. BENSON: When he said granted a credit, it's  
13 better to say abatement of tax. The key is that NOLs -- and  
14 this is on Page 6 of my brief, Footnote 2 -- a credit of  
15 \$11,491,201, attributable to the carryback of NOLs. So  
16 putting aside what he wanted to say a credit normally means,  
17 that was used somewhat colloquially. But the key is it's an  
18 abatement of tax based on the reduction of NOLs, plus \$1.2  
19 million for refunds for tax years 2001 through '11, which  
20 were then reduced by the remaining 5.8 million tax  
21 deficiency and \$5 million in interest. So then there was  
22 the \$1.9 million overpayment, and that then generates this  
23 \$2 million overpayment with overpayment interest that goes  
24 into the refund.

25 The key, though, if I'm reading this correctly, is

1 that part of the refund amount was attributable to the  
2 carryback. So I think my theory was correct that the NOL  
3 comes in, it wipes out the tax liability. It wipes out the  
4 accrued interest under our theory of the amount of interest,  
5 which would be statutory rate. There's some left over, plus  
6 all the refunds; that goes out.

7 And so, this issue of the claim that there was  
8 offset because there were refunds is not correct. Because  
9 it just -- the order of analysis is NOLs from 2008 go to  
10 '98; that is part of the '98 year. Even though they  
11 original elsewhere, they added to that year. That is our  
12 defense of lack of overpayment. There still is an  
13 overpayment, but that's what we're making the recoupment  
14 argument that we had interest that accrued on that amount.  
15 You have these other refunds.

16 The check that goes out is based on the  
17 finalization of '98, based on the NOLs coming back, the  
18 interest calculation. And then all the refunds that you've  
19 accrued but haven't sent out because we've been doing this  
20 10-year examination and you don't want to send money out and  
21 then have to ask for it to come back.

22 THE COURT: Right.

23 MR. BENSON: So I think that I remain correct that  
24 these other refunds are a totally ancillary issue. They  
25 don't go into the fundamental issue we're arguing about,

1 which is what interest rate applies.

2 THE COURT: Okay, all right. What further  
3 briefing would you give me?

4 MR. BENSON: It's more an issue of wanting to make  
5 sure what I just said is actually correct. I suppose that  
6 could be resolved in a quick letter within a week. I'm not  
7 talking about, you know, some massive attempt at a sort of  
8 reply. I just want to -- you know, Your Honor really  
9 focused in on this issue of the refunds.

10 THE COURT: That's right.

11 MR. BENSON: And I just want to make sure that I'm  
12 telling Your Honor the correct thing when I say that those  
13 refund -- or pardon me -- refunds for other years don't  
14 factor into the tax issue we're talking about, which is NOL  
15 carryback to '98 and then what interest -- what is the  
16 appropriate underpayment interest for that tax year. And  
17 that could be resolved very quickly.

18 THE COURT: All right. Well, if somebody wants to  
19 supplement their brief, I'm going to allow that.

20 MR. BENSON: Okay.

21 THE COURT: A letter to me, which you'll docket,  
22 no more than three pages. Is that sufficient?

23 MR. BENSON: Sure.

24 THE COURT: And then I'll give you a week to  
25 reply, Mr. Higgins, if you'd like.

1 MR. HIGGINS: Thank you, Your Honor.

2 THE COURT: And you can tell me that I don't need  
3 to reply, I've made my argument, and that will be fine.

4 MR. HIGGINS: I suspect we'll have something to  
5 say, Your Honor.

6 THE COURT: All right, okay. I've got a lot of  
7 numbers swimming around in my head, and I thought I had it  
8 figured out, but maybe not. So we'll see where we go on the  
9 basis of your letter. All right?

10 MR. BENSON: All right.

11 THE COURT: Anything further, folks?

12 MR. HIGGINS: Not from us, Your Honor.

13 THE COURT: All right. Well, thank you for a good  
14 argument. And with that, we'll stand in recess.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya  
Ledanski Hyde

Digitally signed by Sonya Ledanski  
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Date: September 22, 2017

[&amp; - agree]

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